Appendix

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, Foley Square, on the 15th day of April, one thousand nine hundred and ninety-seven.

BEFORE: Hon. Ralph K. Winter
Hon. José A. Cabranes
Hon. Fred I. Parker
Circuit Judges

UNITED STATES
COURT OF APPEALS
SECOND CIRCUIT
FILED APRIL 15 1997
GEORGE LANGE III,
CLERK

VIPIN TRIVEDI

Appellant

-v-

Docket No. 97-7153

THOMAS COOPER

Appellee

IT IS HEREBY ORDERED that appellee's motion to dismiss the appeal herein be and it hereby is GRANTED.

George Lange III, Clerk

By: /s/ Arthur Heller

Arthur Heller
Administrative Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VIPIN TRIVEDI Plaintiff, -v- THOMAS COOPER Defendant.	x : : : : : : : x	RESERVED DEC 18 1996 95 Civ. 2075 (DLC) OPINION AND ORDER

APPEARANCES:

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DENISE COTE, District Judge:

In response to a jury verdict awarding $700,000 in compensatory damages, plus an additional award of back pay, for an employment discrimination case brought under 42 U.S.C. §§ 1981, 1983, defendant Thomas Cooper moves for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(b). In

the alternative, defendant moves for a new trial pursuant to Fed. R. Civ. P. 59(a), or for a remittitur pursuant to Fed. R. Civ. P. 59(e). Plaintiff, Vipin Trivedi, asserts that defendant's motions for judgment as a matter of law and for a new trial were not timely filed, contests the substance of these motions, and requests an award of back pay.

For the reasons set forth below, I find that reasonable and fair-minded persons could have arrived at the same verdict on liability as the jury and, therefore, will not grant judgment as a matter of law. Additionally, I find that the jury's verdict on liability was so connected to credibility assessments that I will not disturb those determinations by granting defendant's motion for a new trial. I do find, however, that the $700,000 award was excessive given the typical awards in this area and the evidence presented at trial. Therefore, I find that plaintiff shall choose between a remitted damages award of $50,000 as the total judgment, without an additional award of back pay, or conduct a new trial on liability and damages for the hostile work environment claim.

Background

Mr. Trivedi, who is of East Asian Indian national origin, began work as a research scientist at the New York State Office of Mental Health in 1982. On March 28, 1995, Mr. Trivedi filed a claim in federal court under 42 U.S.C. §§ 1981, 1983 and N.Y. Exec. Law § 296 (McKinney 1996),[1] alleging that because of his race or national origin, his supervisor Mr. Cooper harassed Mr. Trivedi, failed to promote him, and retaliated against him for seeking legal assistance in connection with the discrimination. Mr. Trivedi sued Mr. Cooper and the New York State Office of Mental Health. The claims against the Office of Mental Health were dismissed before

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[1] The state law claim was not separately charged to the jury because it was redundant. *See Sagendorf-Teal v. County of Rensselaer*, -- F.3d --, 1996 WL 654321, *6 (2nd Cir. Nov. 12, 1996) (holding dismissal of state law claims appropriate where state law provided no theory for additional damages).

trial on the ground that the claims were barred by the Eleventh Amendment. This Court conducted a jury trial from October 7–16, 1996.

At the trial, Mr. Trivedi asserted that Mr. Cooper assigned him menial tasks in the lab, prevented him from collaborating with other researchers, did not give him work that would lead to publication, prevented him from attending professional seminars and conferences, barred him from using the computer, and prevented him from using the library. The evidence showed that the menial tasks (e.g., packing samples for shipment) took about two hours a week and that the professional staff in the office were the only people normally available to perform the work. While others as well as Mr. Trivedi performed the work he described as menial, Mr. Trivedi was the only research scientist doing it on a regular basis during substantial periods of time. Taken in the light most favorable to the plaintiff, the evidence also established that the kind of research work Mr. Trivedi performed was important, but not highly creative and was unlikely to lead to publication or career advancement. Mr. Trivedi did not travel as much as some co-workers to seminars or conferences, however, such travel was funded by grants the researchers obtained for themselves. Finally, Mr. Trivedi's contentions regarding the computers and library were unsupported by any of the other evidence. The computers and library were available for anyone to use and Mr. Trivedi did not need permission to use them. The most potent evidence of a hostile work environment, however, was Mr. Cooper's use of racial slurs from 1986 onward in speaking to the plaintiff. Mr. Cooper denied making such statements.

Mr. Trivedi also maintained that Mr. Cooper refused on four occasions in the spring of 1994 to sponsor him for promotion -- a sponsorship that Mr. Trivedi stated was essential to receiving the promotion. Mr. Trivedi testified that in two of these conversations Mr. Cooper ridiculed his request by referring to him as a "brown nigger."

Mr. Cooper testified that Mr. Trivedi did not ask Mr. Cooper in 1994 for his support for a promotion and that, in any event, there were two avenues to promotion: sponsorship by a supervisor and self-nomination, where an individual directly approaches the director of the facility to seek a promotion. It was fair to conclude, however., that without a supervisor's support, self-nomination was futile.

Finally, Mr. Trivedi contended that Mr. Cooper retaliated against him for seeking legal assistance to redress his discrimination claims after Mr. Cooper learned of this action in January 1993. Mr. Trivedi claimed that Mr. Cooper retaliated by giving Mr. Trivedi a poor evaluation in mid-1993.

Mr. Cooper denied this allegation, stating that Mr. Trivedi's work performance declined prior to 1993. In his 1991–92 evaluation of Mr. Trivedi, signed in August 1992, Mr. Cooper rated him as only "effective," not "highly effective" as Mr. Trivedi had earned in previous evaluations. Mr. Trivedi's deteriorating performance in 1992 was dramatically demonstrated by his bizarre behavior at two counselling sessions in 1992, as described below.

In addition to denying all of Mr. Trivedi's allegations and presenting evidence to show that Mr. Trivedi's work performance was declining, Mr. Cooper also introduced evidence to demonstrate that Mr. Trivedi suffered from mental illness, specifically, a paranoid delusion that he was being persecuted by Mr. Cooper. Most telling in this regard, he introduced evidence of Mr. Trivedi's behavior during two counselling sessions conducted in July and December 1992 to discuss Mr. Trivedi's deteriorating performance. At the first meeting, Mr. Trivedi taped his mouth shut with gauze he wrapped around his head and refused to speak. At the second meeting Mr. Trivedi wadded his ears with cotton, wore a wool hat, pretended he could not hear, and displayed a sign with directions in case of fire.

Mr. Trivedi explained these actions by saying that he did not want to say anything in the meetings because he no longer trusted Mr. Cooper, and he felt that anything he did say would

be misrepresented in later accounts of those meetings. He felt that if he engaged in the behavior described, the other participants to the meetings would have to make a note of the behavior and therefore no one could allege that Mr. Trivedi had made a statement.

Mr. Cooper also called two expert psychiatrists, Drs. Leonard Rubin and Mark Russakoff, to testify that Mr. Trivedi was mentally ill. Dr. Rubin testified that Mr. Trivedi's actions at the counselling sessions were a sign of "magical thinking." Dr. Rubin said this was

> characteristic of people who have psychotic thought disorders in that they cannot distinguish fantasy from reality, and just wishing that something was unheard makes it so.

Dr. Rubin further testified that his diagnosis of Mr. Trivedi, based on his examination in 1995, was that he suffered from delusional disorder. Dr. Russakoff, who attended the counselling session with Mr. Trivedi in December 1992, testified that in that meeting Mr. Trivedi demonstrated signs of mental illness that were consistent with manifestations of paranoid schizophrenia. Plaintiff did not introduce any psychiatric evidence to dispute the psychiatrists' testimony.

At the close of plaintiff's case, defendant moved for a directed verdict on two of the three claims, retaliation and failure to promote. In this motion, he moves for judgment as a matter of law as to all three claims.

On October 15, 1996, the jury rendered a verdict in favor of Mr. Trivedi. The jury found that Mr. Cooper created a racially hostile work environment, failed to promote the plaintiff, and retaliated against the plaintiff. The jury awarded Mr. Trivedi $700,000 in compensatory damages for pain and suffering for the hostile work environment claim, determined that Mr. Trivedi was entitled to back pay for the failure to promote claim, and awarded $1 in nominal damages for the retaliation claim. On October 16, 1996, the jury concluded that Mr.

Trivedi was not entitled to punitive damages for Mr. Cooper's actions.

Discussion

A. Timeliness of Motions

Plaintiff asserts that defendant did not timely file his motions. Plaintiff argues that pursuant to Rule 50(b) a party must renew its motion for judgment as a matter of law or make a motion for a new trial no later than ten days after the entry of the judgment. The Second Circuit has held that a district court has no discretion to extend this ten-day period for a motion for judgment as a matter of law or a new trial. *Meriwether v. Coughlin*, 879 F.2d 1037, 1041 (2nd Cir. 1989). In this case, however, since the judgment has not yet been entered, the clock has not started to run and defendant had not exceeded the ten-day limit when he filed his papers on November 12, 1996.

B. Judgment as a Matter of Law

Defendant moves for judgment as a matter of law as to all three claims. Defendant has waived his right to make such a motion for the hostile work environment claim as he did not preserve this right during trial by moving for a directed verdict at the end of plaintiff's case. Indeed, "[t]he rule is well established that a motion for directed verdict at the close of all the evidence is a prerequisite" for judgment as a matter of law. *Cruz v. Local Union No. 3 of the Int'l Bhd. of Elec. Workers*, 34 F.3d 1148, 1155 (2nd Cir. 1994) (quoting *Hilord Chemical Corp. v. Ricoh Electronics, Inc.*, 875 F.2d 32, 37 (2nd Cir. 1989) (internal quotations omitted)).

With respect to the retaliation and failure to promote claims, defendant has preserved his right to renew the motion, since a party who moved for and was denied a judgment as a matter of law may renew such a motion after the judgment is entered. Fed. R. Civ. P. 50(b). The Second Circuit recently stated

> In ruling on a motion for . . . [judgment as a matter of law], the district court is required to deny the motion unless, viewed in the light most favorable to the nonmoving party, the evidence is such that, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict that reasonable [persons] could have reached.

Binder v. Long Island Lighting Co., 57 F.3d 193, 199 (2nd Cir. 1995) (quoting *Sir Speedy, Inc. v. L & P Graphics, Inc.*, 957 F.2d 1033, 1038–39 (2nd Cir. 1992)) (internal quotations and citations omitted). Further, the Second Circuit has held that a motion for judgment as a matter of law should be granted when

> (1) there is such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or (2) there is such an overwhelming amount of evidence in favor of the moving that reasonable and fair-minded [persons] could not arrive at a verdict against it.

Eagleston v. Guido, 41 F.3d 865, 875 (2nd Cir. 1994) (citation omitted) (brackets in original), *cert. denied*, 116 S. Ct. 53 (1995).

To determine liability in this case, the jury had to make credibility findings, in particular between the plaintiff and defendant. The jury's verdict indicates that it concluded that the plaintiff was credible. The jury having found the plaintiff credible, there was sufficient basis for the verdict. As a consequence, I do not find that the verdict was the result of sheer surmise or conjecture, nor do I find that no reasonable person could have arrived at it, and, therefore, will not grant judgment as a matter of law on either the failure to promote or retaliation claim.

C. Motion for a New Trial

Plaintiff also requests a new trial on all three claims, pursuant to Rule 59, Fed. R. Civ. P. The Court may grant a new trial if it is convinced that the jury's verdict was "against the weight of the evidence" or that the jury has reached a "'seriously erroneous result.'" *U.S. East Telecommunications, Inc. v. U.S. West Communications Services, Inc.*, 38 F.3d 1289, 1301 (2d Cir. 1994) (quoting *Mallis v. Barkers Trust Co.*, 717 F.2d 683, 691 (2d Cir. 1983)); *see also Piesco v. Koch*, 12 F.3d 332, 344 (2d Cir. 1993) ("seriously erroneous" standard reaffirmed as the standard of Second Circuit). The Second Circuit has also characterized this standard as one of determining whether "the verdict is a miscarriage of justice." *Smith v. Lightening Bolt. Prod., Inc.*, 861 F.2d 363, 370 (2nd Cir. 1988).

Under this standard, the Court "'is free to weigh the evidence [itself] and need not view it in the light most favorable to the verdict winner.'" *Song v. Ives Laboratories, Inc.*, 957 F.2d 1041, 1047 (2d Cir. 1992) (quoting *Bevevino v. Saydjari*, 574 F.2d 676, 684 (2d Cir. 1978) (citing 11 C. Wright & A. Miller *Federal Practice and Procedure* § 2806, at 44–45 (1973))). Even if there is substantial evidence to support the jury verdict, a new trial may be warranted. *Song*, 957 F.2d at 1047 (citing *Bevevino*, 574 F.2d at 683 (citing C. Wright & A. Miller, supra, § 2806, at 43)). Nevertheless, the Court must bear in mind that

> [w]here the resolution of the issues depended on assessment of the credibility of the witnesses, it is proper for the court to refrain from setting aside the verdict and granting a new trial.

Piesco, 12 F.3d at 345 (quoting *Metromedia Co. v. Fugazy*, 983 F.2d 350, 363 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 2445 (1993)).

In the instant case, I find that the jury verdicts on the failure to promote and retaliation claims were not against the weight of the evidence and, therefore, will not disturb those

determinations. The issue of whether the verdict on the hostile work environment claim is against the weight of the evidence is a much closer question.

The evidence strongly suggested that the plaintiff suffered from mental illness and fabricated or imagined the discrimination. The testimony presented by Drs. Rubin and Russakoff about Mr. Trivedi's mental state was not rebutted. Both doctors testified that Mr. Trivedi suffered from a delusional disorder or paranoia. The plaintiff did not present expert testimony to rebut the assertion that he was paranoid or delusional, relying instead on the arguments that the experts had insufficient contact with the plaintiff to form a reliable conclusion or that the experts' opinion depended on the assumption that the discriminatory acts had not occurred. There was, however, strong evidence in the record that confirmed the experts' opinions. The most dramatic such evidence was the plaintiff's aberrational behavior at the two counselling sessions -- taping his mouth and covering his ears. The plaintiff did not deny that he had behaved as described, but rather sought to explain the behavior as a rational response to his belief that he could no longer trust the defendant not to distort his words. In addition to this bizarre behavior, the nature and content of plaintiff's handwritten writings attached to his annual evaluation forms were additional powerful evidence that the experts were correct in their evaluation that the plaintiff was a seriously disturbed person. Finally, the experts' opinions that the plaintiff was suffering from delusion and paranoia are confirmed by the nature of the allegations of the plaintiff made at the trial. For instance, the plaintiff contended that the defendant, who was his supervisor, used demeaning racial epithets for years in speaking to him in public work places, and yet was unable to identify any witness to this conduct. In addition, Mr. Trivedi's allegations of obstructionism by Mr. Cooper -- such as blocking access to computers and the library -- were entirely unfounded. As noted above, Mr. Trivedi had unrestricted access to the library and to computers.

It is somewhat ironic that the plaintiff's most compelling argument offered to rebut the evidence of his mental condition was the defendant's own actions, specifically the fact that the defendant did not take steps to terminate plaintiff's employment during the years that his behavior deteriorated. The defendant explained that the loss of Mr. Trivedi would have meant the loss of funding for his research slot. In light of the seriously disruptive nature of Mr. Trivedi's mental condition, at least as described by the defendant, it was not surprising that the jury found this explanation inadequate.

Nonetheless, I find that the evidence at trial strongly supports the defendant's claim that the jury's verdict was against the weight of the evidence and a seriously erroneous result. Since the resolution of whether the defendant created a hostile work environment for the plaintiff depended critically on the jury's assessment of the credibility of these two parties, however, it would be inappropriate for the Court to grant a new trial on this claim.

D. Remittitur

Remittitur is the "process by which a court compels a plaintiff to choose between reduction of an excessive verdict and a new trial." *Earl v. Bouchard Transp. Co.*, 917 F.2d 1320, 1328 (2nd Cir. 1990) (quoting *Shu-Tao Lin v. McDonnell Douglas Corp.*, 742 F.2d 45, 49 (2nd Cir. 1984)) (internal quotation marks omitted). Before I order plaintiff to make this choice, I must first determine whether the verdict is excessive. If I determine the award shocks the judicial conscience, I should remit the jury's award to the maximum amount that would not be excessive. *Earl*, 917 F.2d at 1330. *See also Pescatore v. Pan American World Airways, Inc.*, 97 F.3d 1, 18 (2nd Cir. 1996) (citation omitted) (in federal question case, district court has discretion to find award excessive if it "shock[s] the judicial conscience").[2]

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[2] Since this Court had federal question jurisdiction pursuant to 28 U.S.C. §1331, I will apply federal law in determining the excessiveness of the award. If this was a diversity case, I would apply New York law.

(Footnote continued)

While it is properly within the province of the jury to calculate damages, there is "an upper limit, and whether that has been surpassed is not a question of fact with respect to which reasonable [persons] may differ, but a question of law." *Mazyck v. Long Island R. Co.*, 896 F. Supp. 1330, 1336 (E.D.N.Y. 1995) (quoting *Dagnello v. Long Island R.R. Co.*, 289 F.2d 797, 806 (2nd Cir. 1961)) (internal quotations omitted). Moreover, although a jury has broad discretion to award damages as it feels appropriate, "it may not abandon analysis for sympathy for a suffering plaintiff and treat an injury as though it were a winning lottery ticket." *Scala v. Moore McCormack Lines, Inc.*, 985 F.2d 680, 684 (2nd Cir. 1993) (citation omitted). A jury verdict cannot stand if it is the result of a miscarriage of justice and represents a windfall to the plaintiff without regard for the actual injury. *Annis v. County of Westchester*, 9[illegible] F. Supp. 1115, 1121 (S.D.N.Y. 1996).

To determine whether the award is excessive, it is appropriate to examine awards in similar cases. *Lee v. Edwards*, --- F.3d ---, 1996 WL 692403, *7 (2nd Cir. Oct 31, 1996) (quoting *Ismail v. Cohen*, 899 F.2d 183, 186 (2nd Cir. 1990) (regarding damages, "whether compensatory or punitive")). A court should determine whether the award is "within reasonable range," not just "balance the number of high and low awards and reject the verdict in the instant case if the number of lower awards is greater." *Ismail*, 899 F.2d at 187. Additionally, in reviewing a damage award, it is important to examine the particular facts and circumstances of other cases and compare them to the current case. *Scala*, 98S F.2d at 684. Finally, a district court should not limit its comparison of

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Gasperini v. Center for Humanities, Inc., 116 S.Ct. 2211, 2221 (1996); *Consorti v. Armstrong World Indus.*, 72 F.3d 1003, 1011 (2nd Cir. 1995). The difference is important as New York law instructs a court to determine whether the award "materially deviates from what would be reasonable compensation," N.Y. Civ. Prac. Law & Rules § 5501(c), a standard "less deferential to the jury's verdict than the federal standard." *Consorti*, 72 F.3d at 1011. As I am not compelled to follow New York law, I will use the federal standard, but will still draw on New York case law in examining the size of awards given in similar cases.

awards to Section 1983 claims. *Ismail*, 899 F.2d at 186 (citing *Martell v. Boardwalk Enterprises, Inc.*, 748 F.2d 740, 750 (2nd Cir. 1984) (in diversity cases, court should look to awards under comparable state laws); *Zarcone v. Perry*, 572 F.2d 52, 54–55 (2nd Cir. 1978) (in federal civil rights claims a court should look at general damages principles)).

Plaintiff cites only two cases with substantial awards. In *New York City Transit Auth. v. State Div. of Human Rights*, 181 A.D.2d 891, 581 N.Y.S.2d 4426 (2d Dep't), *appeal denied*, 80 N.Y.2d 762, 607 N.E.2d 818, 592 N.Y.S.2d 671 (1992), a gender discrimination case, the plaintiff suffered severe discrimination in four intentional episodes related to her pregnancy. The administrative law judge who presided over the initial hearing found the case to be "the most shocking instance of abuse of an employee by an employer" that he had seen in twenty years at the Division of Human Rights. *Id.* at 894, 581 N.Y.S.2d at 429. In *Sogg v. American Airlines*, 193 A.D.2d 153, 603 N.Y.S.2d 21 (App. Div. 1993), the court upheld the trial court's reduction of a $1,125,000 award to $400,000 for discrimination based on the plaintiff's sex, age and disability. While the final award was sizeable, it is notable that it was reduced by $725,000.

An examination of other cases -- circuit and district court cases discussed in reverse chronological order -- demonstrates that upholding a $700,000 award for compensatory damages for emotional distress would be unprecedented. For example, in an age discrimination case brought under New York and federal law, the Second Circuit affirmed the trial court's remittitur of a jury award of nearly $498,000 for pain and suffering to $5,000. *Binder*, 57 F.3d at 198, 202. The defendants terminated plaintiff and did not find him similar employment within the company, although other positions were available. These positions were given to younger employees. *Binder v. Long Island Lighting Co.*, 847 F. Supp. 1007, 1009 (E.D.N.Y. 1994). The trial court found that the award was "grossly excessive" based on the plaintiff's scanty evidence of emotional distress. *Id.* at 1028. It also found that the jury award was likely the product of a specific calculation -- because the

actual award was for a specific amount, $497,738 -- yet the jury had no evidence on which to base a calculation. *Id.*

In *Miner v. City of Glens Falls*, 999 F.2d 655 (2nd Cir. 1993), the trial court determined that a $12,000 award in a Section 1983 suit was not excessive for a police officer, denied due process and forced to retire, who suffered humiliation as he applied for public assistance, sold his new home, and had deteriorating relations with his family. *Id.* at 662–63.

In a suit brought by an African American corrections officer under 42 U.S.C. §§ 1981, 1983, and Title VII, for *inter alia* racial harassment, failure to promote, poor job assignments, an unwarranted disciplinary sanction and unjustified public embarrassment, the Second Circuit upheld the district court's determination that a $50,000 award was not excessive. *Wade v. Orange County Sheriff's Office*, 844 F.2d 951, 955 (2nd Cir. 1988).

In a case that raised issues similar to those raised by Mr. Trivedi -- including race discrimination in employment for failure to promote and retaliation for complaining of discrimination -- brought under Title VII, 42 U.S.C. § 1981, and New York law, the jury awarded over $219,000 in compensatory damages. *McIntosh v. Irving Trust Co.*, 887 F. Supp. 662, 663 (S.D.N.Y. 1995). The court found that the award shocked the judicial conscience, was out of line with other compensatory damage awards for emotional distress, and was not founded in the evidence introduced at trial and therefore reduced the award to $20,000. *Id.* at 669. The court in that case also conducted a survey of recovery under New York law for emotional distress and found that jury awards range from $5,000 to $15,000. *Id.* at 666–69.

In a case of housing discrimination brought by an interracial couple and their child under 42 U.S.C. §§ 1981, 1983, the Fair Housing Act (42 U.S.C. §§ 3601–19), and New York law, a jury awarded each parent $100,000 and the child $80,000 for emotional distress associated with the discrimination. In addition to determining that a causation issue needed to be reexamined in connection with the jury award,

the trial court found that the $280,000 award shocked the judicial conscience and granted a new trial on compensatory damages. *Portee v. Hastaya*, 853 F. Supp. 597, 612–13 (E.D.N.Y. 1994).

Finally, this Court finds guidance for appropriate compensatory damages in the Civil Rights Act of 1991, Pub. L. No. 102–166, 105 Stat. 1071–1100 (codified at 42 U.S.C. §§ 2000e-5(g) and 42 U.S.C. § 1981(b)). That Act created additional remedies for intentional discrimination under Title VII, specifically for plaintiffs who cannot recover under 42 U.S.C. § 1981. The relevant provision caps compensatory and punitive damages at an amount between $50,000 and $300,000, depending on the number of employees of the defendant. 42 U.S.C. § 1981a(b)(3). While this provision is not applicable in the instant case, it does indicate that even if Mr. Trivedi had sued a large corporation under Title VII, his maximum recovery would have been $300,000 -- assuming he could prove sufficient circumstances to warrant such an award.

In addition to comparing the present award with other awards, a court should also look to whether there is adequate evidentiary support for the emotional distress award. It is appropriate for a trial court to reduce an award where there is "sparse evidence with respect to the magnitude and duration of emotional injury or mental distress" in order to guard against awards based on speculation. *McIntosh*, 887 F. Supp. at 665. An examination of similar cases -- again, organized by level of court and age -- reveals that Mr. Trivedi did not present either the quality or quantity of evidence to support a $700,000 award.

Some courts have upheld awards with speculative evidence, but the awards have been for much smaller amounts. For example, in an age discrimination case brought under New York law, the Second Circuit determined that an "extremely modest" award of $18,000 for emotional distress did not shock the judicial conscience. *Tyler v. Bethlehem Steel Corp.*, 958 F. 2d 1176, 1190 (2nd Cir. 1992). In that case, a 48-year-old salesman was terminated and denied a transfer to

a different office. Subsequently, thirteen salespeople, all of whom were younger than plaintiff, were hired in positions similar to the one plaintiff sought. *Id.* at 1179. Plaintiff testified that losing his job was "like a divorce, your wife died or state of shock." *Id.* at 1190.

A trial court did find sufficient substantiation to uphold an award in *Marfia v. T.C. Ziraat Bankasi, New York Branch*, 903 F. Supp. 463 (S.D.N.Y. 1995). In that case, the trial court let stand a jury award of $100,000 for pain and suffering where a bank employee of Italian national origin was fired from a Turkish bank in New York and was subject to harassment while employed at the bank because of his national origin. The plaintiff tried to kill himself but was stopped by his 15-year-old son. The plaintiff then spent two weeks in the hospital under a suicide watch. *Id.* at 467, 471.

In *Lightfoot v. Union Carbide Co.*, 901 F. Supp. 166 (S.D.N.Y. 1995), an age discrimination suit brought under New York and federal law, the court remitted a compensatory damages award of $750,000 to $75,000 because the award was not in accord with other awards and was not founded in the evidence at trial. *Id.* at 169–70. The court specifically compared that case with *Marfia*, *supra*, and found no such compelling circumstances.

In this case, Mr. Trivedi introduced very scant evidence on the issue of emotional distress, and certainly inadequate to support a claim of $700,000. There was no evidence of psychological counselling, physical manifestations of distress, or other actions consistent with emotional distress. The only evidence presented to prove emotional distress was Mr. Trivedi's testimony that he felt he was "starved of professional growth" and that the discrimination made him feel "like how a woman would feel if her child were lost. On the emotional side I felt insulted, I felt indignant, I felt unhappy, I felt emotionally upset."

These conclusory statements, with nothing more, are patently insufficient to uphold the $700,000 award. Indeed, Mr. Trivedi could not point to any compelling effect of the

discrimination, and certainly nothing along the lines of the plaintiff in *Marfia*, where the extraordinary circumstances only warranted an award of $100,000 for the emotional distress.

Given the facts presented at trial, I find that $50,000 is a generous award, represents the maximum that does not shock the judicial conscience, and is not out of line with other cases.

E. New Trial on all Issues versus Damages

When a court grants a new trial as an alternative to remittitur, it must determine whether to grant a new trial on all issues, or a discrete issue, such as damages but not liability. The standard set by the Second Circuit is that

> a partial new trial may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice.

In re Joint E. Dist. & S. Dist. Asbestos Lit., 995 F.2d 343, 346 (2nd Cir. 1993) (quoting *Bohack Corp. v. Iowa Beef Processors, Inc.*, 715 F.2d 703, 709 (2nd Cir. 1983) (internal quotation marks and citation omitted)). In that case, the Second Circuit determined that since

> the same jury heard the liability and damage phases of the trial, [it makes] partial reversal more problematic than it would be if separate juries had been impaneled.

Id. The determination, therefore, rests on the separability of the issues.

Plaintiff cites *Wheatley v. Beetar*, 637 F.2d 863 (2nd Cir. 1980), to support his argument that this Court should not order a new trial on all issues merely because of the excessiveness of the award. In *Wheatley*, the court conducted a bifurcated trial on a case of excessive police force in violation of the plaintiff's constitutional rights. The Second Circuit held that there should be a new trial on damages because the jury's

award of nominal damages, after having found through its verdict on liability that the plaintiff had been beaten by the police, indicated that the jury had acted "on the basis of impermissible considerations." *Id.* at 867.

In *Wheatley*, unlike here, the jury's liability decision was supported by substantial evidence, including a witness who heard the beating and the plaintiff's brother who the police prevented from photographing the plaintiff after the beating. *Id.* at 864. The defendants in *Wheatley* did not even challenge the verdict on liability in their appeal. The instant case is different since Mr. Trivedi did not introduce comparable evidence to demonstrate uncontroverted liability.

In this case, it is not possible to hold a new trial on damages without also retrying the issue of liability because the amount of damages is integrally linked to the liability and actions of Mr. Cooper. A jury would need to consider the causation between Mr. Cooper's actions and Mr. Trivedi's injuries, as well as the extent of the harassment and what amount of recovery it warrants. Put another way, liability is not a separate issue in this case. A jury will need to determine the extent of Mr. Cooper's liability in order to determine the extent of Mr. Trivedi's injuries, and award damages for those injuries.

For these reasons, I find that a new trial on damages cannot be separated from a new trial on liability and determine that a new trial must encompass both issues.

F. Back Pay

Prior to trial the parties agreed that, should the jury find for the plaintiff on the issue of the failure to promote him 1994, the Court would decide whether and to what extent the plaintiff was entitled to back pay, based on the evidence at trial. The parties agree that no one promoted in 1994 has yet received any increase in pay since the legislature has not yet funded the increases. The plaintiff contends that this Court should award him $3,000 per year with interest from April 1994 to whenever the agency makes retroactive payment to

those who were promoted in April 1994. The defendant contends that it is the State's policy not to make retroactive payments, and that in any event the plaintiff cannot require Mr. Cooper to pay him back pay.

I find that plaintiff is not entitled to any award for back pay. Plaintiff presented no evidence at trial that he would have received additional money for his promotion since others promoted at the time defendant failed to promote Mr. Trivedi have not received salary increases to date and the Office of Mental Health has made clear that it will not make retroactive salary increases. The plaintiff himself admits it would be unjust to award him back pay when others who were promoted in 1994 will not receive retroactive raises.

Conclusion

I will not grant judgment as a matter of law on either of the grounds preserved at trial because the jury was justified in rendering a verdict for the plaintiff. I do not find that the jury based their verdict on "sheer surmise and conjecture." Nor do I do find that a reasonable and fair-minded person could not have found for the plaintiff on the issue of liability. Additionally, given the importance of credibility findings to the jury's verdict, I will not grant defendant's motion a new trial on liability. I do find, however, that the compensatory damages award of $700,000 for pain and suffering is excessive given the typical awards in this area and the evidence presented at trial. Therefore, I will remit the award to $50,000, which plaintiff may accept in lieu of a new trial. If plaintiff does choose a new trial, this trial must be had on the defendant's liability for creating a hostile work environment as well as damages on that claim since the issues of liability and damages are so interwoven. For the reasons stated above, it is hereby

ORDERED that plaintiff's attorney may file with the Clerk of the Court on or before December 30, 1996, an acceptance of a remittitur of $650,000, for a final judgment of $50,000 for all damages connected with this case.

IT IS FURTHER ORDERED that in the event plaintiff's attorney does not file an acceptance of the remittitur on or before December 30, 1996, a new trial on liability and damages for the hostile work environment claim will commence on a date to be set by the Court.

SO ORDERED:

Dated: New York, New York
December 16, 1996

/s/ Denise Cote
Denise Cote
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

C. 1/6/97

VIPIN TRIVEDI,

Plaintiff,

-v-

THOMAS COOPER,

Defendant.

U.S. DISTRICT COURT
S.D. OF N.Y.
FILED JAN 6 1997

95 CIV. 2075 (DLC)

CIVIL JUDGMENT

#34 #97,0014

Whereas, a jury trial having come before the Honorable Denise L. Cote, United States District Judge, and the Jury having awarded the plaintiff the sum of $700,000.00 in compensatory damages, plus an additional award for back pay; the defendant now moves for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(b), and in the alternative defendant moves for a new trial pursuant to Fed. R. Civ. P. 59(e), and the Judge, having issued her Opinion (77740) and Order of December 16, 1996; denying defendant's motion for judgment as a matter of law, and denying defendant's motion for a new trial on liability, however the Judge having found that the compensatory damages award of $700,000.00 was excessive and will remit the award to $50,000.00 which plaintiff has accepted in lieu of a new trial on damages, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's opinion (77740) and Order dated December 16, 1996, defendant's motion for judgment as a matter of law is denied, it is further,

ORDERED, ADJUDGED AND DECREED: That defendant's motion for a new trial is denied, it is further,

ORDERED, ADJUDGED AND DECREED: That in light of plaintiff's response to the Opinion and Order of

December 16, 1996, the compensatory damages award of $700,000.00 is remitted to $50,000.00, in lieu of a new trial on damages, and it is further,

ORDERED, ADJUDGED AND DECREED: That, as the parties stipulated and agreed in the Stipulation of Settlement of Attorney's Fees and Costs, defendant shall pay the amount of $42,511.00 to Michael H. Sussman, Sussman, Bergstein, Wotorson & Whateley, 25 Main Street, Goshen, NY 10924, in full settlement of any and all claims for reasonable attorney's fees and costs in connection with the claims against defendant in this action, including the claims for attorney's fees and costs settled pursuant to the Stipulation.

Dated: New York, New York
January 3, 1997

SO ORDERED:

/s/ Denise Cote
Denise Cote
United States District Judge

JAMES M. PARKINSON
/s/ James M. Parkinson
Clerk of Court

By:
/s/
Deputy Clerk

THIS DOCUMENT WAS ENTERED
ON THE DOCKET ON 1-7-96

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VIPIN TRIVEDI,

Plaintiff,

-vs-

THOMAS COOPER,

Defendant.

NOTICE OF APPEAL

95 CIV. 2075 (DLC)

PLEASE TAKE NOTICE that PLAINTIFF VIPIN TRIVEDI, hereby notices his intention to appeal from each and every aspect of the attached CIVIL JUDGMENT (filed January 6, 1997) and OPINION and ORDER (dated December 16, 1996) that remitted plaintiff's $700,000 jury award to $50,000.

Dated: January 30, 1997
Goshen, New York

/s/ Stephen Bergstein
STEPHEN BERGSTEIN

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